Public Prosecutor v Mohammad Zulhiznie bin Zaini

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO PA-41H-13–11 OF 2020
AMIRUDIN ABD RAHMAN JC
29 JULY 2021

Criminal Procedure — Sentencing — Appeal against sentence — Respondent released on bond of good behaviour — Whether sentence was manifestly inadequate — Whether court had discretion to pass probationary orders — Whether purposes and principles of sentencing was achieved — Whether bond of good behaviour was suitable — Criminal Procedure Code s 294 — Police Act 1967 s 86(1)

The respondent who served in the Royal Malaysian Police ('PDRM') holding the rank of 'konstabel sokongan' was charged on 3 November 2020 in the Butterworth magistrate's court for an offence of desertion pursuant to sub-s 86(1) of the Police Act 1967. The respondent pleaded guilty to the charge preferred against him on the very first day he was charged in the Butterworth magistrate's court. Following his guilty plea, the deputy public prosecutor proceeded to tender the facts of the case. The facts of the case were subsequently read to the respondent and he admitted the same and the magistrate convicted the respondent on the charge. After having heard the plea of mitigation from the counsel representing the respondent and the submission of the deputy public prosecutor, the magistrate released him on a good behaviour bond in line with s 294 of the Criminal Procedure Code ('the CPC') with the condition that the respondent was to self-report at Tikam Batu Police Station at the early of every month for a period of two years in accordance with s 294A of the CPC. Dissatisfied with the order of the magistrate's court, the prosecution appealed against the said decision. The issue for consideration in the appeal was whether the sentence imposed by the magistrate under s 294 of the CPC was manifestly inadequate in view of the statutory penalty provided for under s 86(1) of the Police Act 1967.

Held, dismissing the appeal:

(1) It was unambiguous that when a statute used the term 'shall be liable', the court was granted the discretion whether or not to pass down probationary orders such as ss 294 and 173A of the CPC. Using the term 'shall be liable' instead of 'shall be punished' in a penal provision, reflected on the aim of the Legislature in conferring the discretion to the courts. When the wordings 'shall be liable' was used it would constitute that the discretion was given to the courts if a probationary order was deemed

more suitable, as at the end of the day the choice for the fitting term or word was made by Parliament itself (see para 16).

(2) Section 294 of the CPC would only be applicable to penal provisions which carry a term of imprisonment of less than ten years. In this case, there was no illegality when the court applied s 294 of the CPC for the offence of desertion pursuant to s 86(1) of the Police Act 1967 as the offence carried an imprisonment of a maximum of 12 months which was well below the threshold of ten years. The discretion to apply s 294 of the CPC was well within the powers and ambit of the magistrate after considering the severity of the charge, facts and reflecting upon the mitigating and aggravating factors (see paras 23–24).

(3) The offence committed by the respondent was one which did not involve violence, malice or brutality as well as it did not amount to a threat to public security and safety of others. The courts in determining the sentence to be imposed, was at liberty to take this as a factor to be considered. Crimes which were overtly violent and heinous which are *mala in se* should never be given a light sentence as the correct purpose of sentencing would be aimed at deterrence and retribution. A person who commits an offence as such must be shown abhorrence by the justice system. However, for offences which are mala prohibita in nature, the courts may consider in passing a sentence having rehabilitation in mind amongst other sentencing purposes. Section 86(1) of the Police Act 1967 committed by the respondent was indeed a mala prohibita offence. The respondent in this case was a first offender and he had no prior convictions. It had been a long judicial principle to award leniency to first offenders. The court was of the view that, upon consideration of the mitigating and aggravating factors and deliberating upon the facts of the case, a bond of good behaviour pursuant to s 294 of the CPC served the principles and purposes of sentencing and was in line with established judicial principles (see paras 35, 37–38 & 44).

(4) It was also the findings of the court that a bond of good behavior was the most appropriate sentence to be imposed in the respondent's case. Rehabilitation as the main purpose of sentencing was rightly applied by the magistrate in this case, after consideration of the facts and circumstances presented upon determining the sentence imposed on the respondent. The appeal was dismissed and the decision of the magistrate was affirmed (see paras 42, 45 & 47).

[Bahasa Malaysia summary

Responden merupakan anggota Polis Diraja Malaysia (PDRM) yang mempunyai 'konstabel sokongan' tersebut didakwa pada 3 November 2020 di mahkamah majistret Butterworth atas kesalahan di bawah sub-s 86(1) Akta Polis 1967. Responden telah mengaku bersalah atas pertuduhan yang

dibacakan terhadapnya pada hari pertama dia didakwa di mahkamah majistret Butterworth. Berikutan pengakuan bersalahnya, timbalan pendakwa raya meneruskan untuk memberi keterangan mengenai fakta kes itu. Fakta kes diakui oleh responden dan majistret mensabitkan responden ke atas pertuduhan itu. Selepas mendengar rayuan daripada peguam yang mewakili responden dan hujahan timbalan pendakwa raya, majistret membebaskan responden dengan bon berkelakuan baik menurut s 294 Kanun Tatacara Jenayah ('KTJ') dengan syarat responden perlu melapor diri di Balai Polis Tikam Batu pada setiap awal bulan bagi tempoh dua tahun menurut s 294A KTJ. Tidak berpuas hati dengan perintah mahkamah majistret tersebut, pihak pendakwaan merayu terhadap keputusan tersebut. Isu untuk dipertimbangkan dalam rayuan tersebut adalah sama ada hukuman yang dijatuhkan oleh majistret menurut s 294 KTJ tersebut tidak memadai jika dibandingkan dengan hukuman yang diperuntukkan di bawah s 86(1) Akta Polis 1967.

Diputuskan, menolak rayuan:

(1) Istilah 'hendaklah bertanggungan' adalah tidak jelas dan mahkamah telah diberikan budi bicara sama ada untuk memberikan perintah percubaan menurut ss 294 dan 173A KTJ. Mengambilkira perkataan 'hendaklah bertanggungan' berbanding 'hendaklah dihukum' di dalam peruntukan undang-undang jenayah, merupakan tujuan badan perundangan untuk memberikan budi bicara kepada mahkamah. Apabila perkataan 'hendaklah bertanggunggan' digunakan, ianya meerupakan satu budi bicara boleh digunakan oleh mahkamah sekiranya perintah percubaan dianggap lebih sesuai, yang mana Parlimen sendiri yang menggunakan perkataan tersebut (lihat perenggan 16).

(2) Seksyen 294 KTJ hanya terpakai kepada proviso yang membawa hukuman penjara kurang dari sepuluh tahun. Di dalam kes ini, tiada kesalahan undang-undang apabila mahkamah menggunakan s 294 KTJ bagi kesalahan pengasingan menurut s 86(1) Akta Polis 1967 kerana kesalahan tersebut membawa hukuman penjara maksimum 12 bulan yang tidak melebihi hukuman teras selama sepuluh tahun. Budi bicara untuk mengguna pakai s 294 CPC adalah di dalam kuasa dan budi bicara majistret selepas mempertimbangkan keseriusan pertuduhan, fakta dan faktor-faktor mitigasi dan pemberatan (lihat perenggan 23–24).

(3) Kesalahan yang dilakukan oleh responden adalah kesalahan yang tidak melibatkan keganasan, kejam atau kekejaman atau ancaman kepada keselamatan dan keselamatan orang lain. Mahkamah dalam menentukan hukuman yang akan dikenakan, boleh mengambil perkara ini sebagai faktor yang perlu dipertimbangkan. Jenayah *mala in se* tidak boleh diberikan hukuman ringan kerana tujuan hukuman adalah bertujuan untuk menghalang dan menghukum. Seseorang yang melakukan suatu kesalahan sedemikian mestilah dihukum untuk menunjukkan

kepatuhan kepada sistem keadilan. Walau bagaimanapun, bagi kesalahan yang mala prohibita, mahkamah boleh mempertimbangkan dalam memberikan hukuman untuk pemulihan berbanding hukuman lain. Seksyen 86(1) Akta Polis 1967 yang dilakukan oleh responden sememangnya merupakan kesalahan mala prohibita. Responden di dalam kes ini adalah pesalah pertama dan dia tidak mempunyai sabitan terdahulu. Mahkamah kebiasaannya memberikan kelonggaran kepada pesalah pertama. Mahkamah ini berpendapat bahawa, setelah mempertimbangkan faktor-faktor mitigasi dan pemberatan dan mempertimbang fakta kes, bon berkelakuan baik menurut s 294 KTJ adalah selaras dengan prinsip hukuman dan prinsip kehakiman (lihat perenggan 35, 37–38 & 44).

(4) Mahkamah ini berpendapat bahawa bahawa bon berkelakuan baik adalah hukuman yang paling sesuai untuk diberikan kepada responden ini. Prinsip pemulihan sebagai tujuan utama hukuman adalah betul di dalam kes ini, selepas mempertimbangkan fakta dan meneliti keadaan kes. Rayuan tersebut ditolak dan keputusan majistret disahkan (lihat perenggan 42, 45 & 47).]

Cases referred to

Abdul Rahman bin Ibrahim v The Public Prosecutor of Johore [1938] 1 MLJ 219 (refd)

Bachan Singh v State of Punjab AIR 1980 SC 898; 1980 CriLJ 636; 1982 (1) SCALE 713; (1980) 2 SCC 684; 1983 1 SCR 145, SC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193; [2002] 3 CLJ 457, FC (refd)

Jayanathan v PP [1973] 2 MLJ 68; [1973] 1 LNS 56, FC (refd)

Joseph D' Cruz v Rex [1940] 1 MLJ 94; [1940] 1 LNS 35 (refd)

Nor Afizal bin Azizan v PP [2012] 6 MLJ 171; [2012] 6 CLJ 370, CA (refd)

Philip Lau Chee Heng v PP [1988] 3 MLJ 107; [1988] 2 CLJ 873; [1988] 2 CLJ Rep 144, HC (refd)

PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)

PP v Bahar bin Abu [2007] 8 MLJ 219; [2007] 4 CLJ 604, HC (refd)

PP v Govindnan a/l Chinden Nair [1998] 2 MLJ 181; [1998] 2 CLJ 370, HC (refd)

PP v Man bin Ismail [1939] 1 MLJ 207; [1938] 1 LNS 54 (refd)

PP v Mark Koding [1983] 1 MLJ 111; [1982] 1 LNS 96 (refd)

Raja Izzuddin Shah v PP [1979] 1 MLJ 270; [1978] 1 LNS 165 (refd)

Zaidon bin Shariff v PP [1996] MLJU 159; [1996] 4 CLJ 441, HC (refd)

Legislation referred to

Criminal Procedure Code ss 173A, 294, 294A

Penal Code ss 52A, 528

Police Act 1967 s 86(1)

Farah Aimy Zainul Anwar (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the appellant.
Anbananthan a/l Yathiraju (Anba & Assoc) for the respondent.

Amirudin Abd Rahman JC:

BACKGROUND

[1] The respondent (Mohammad Zulhiznie bin Zaini) who served in the Royal Malaysian Police (PDRM) holding the rank of 'konstabel sokongan' was on 3 November 2020 charged in the Butterworth Magistrate's Court for an offence of desertion pursuant to sub-s 86(1) of the Police Act 1967 (Act 344).

[2] The charge against the respondent reads as follows:

> Bahawa kamu pada 16/7/2019 sehingga 08/08/2019, jam lebih kurang 6.15 petang di alamat Balai Polis Butterworth, Jalan Heng Choon Thian, 12000, Butterworth di dalam daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang semasa bertugas sebagai anggota tugas am Balai Polis Butterworth telah didapati tanpa sebab-sebab yang munasabah tidak hadir bertugas selama 24 hari berturut-turut. Oleh yang demikian itu kamu telah melakukan suatu kesalahan di bawah seksyen 86(1) Akta Polis 1967 yang boleh dihukum di bawah seksyen yang sama.

[3] The respondent pleaded guilty to the charge preferred against him on the very first day he was charged in the Butterworth Magistrate's Court. Following his guilty plea, the deputy public prosecutor proceeded to tender the facts of the case. The facts of the case were subsequently read to the respondent and he admitted the same and the magistrate convicted the respondent on the charge.

[4] After having heard the plea of mitigation from the counsel representing the respondent and the submission of the deputy public prosecutor, the magistrate released him on a good behaviour bond in line with s 294 of the Criminal Procedure Code ('the CPC') with the condition that the respondent is to self-report at Tikam Batu Police Station at the early of every month for a period of two years in accordance with s 294A of the CPC.

[5] Dissatisfied with the order of the magistrate's court, the prosecution appealed against the said decision.

FACTS OF THE CASE

[6] Based on the exhibits tendered, particularly the facts of the case, the facts are rather simple and straightforward and can be concluded as follows.

(a) on 8 August 2019 at about 6.15pm, ASP Thanabalan Maniam (the complainant) had examined the record of attendance of the respondent and upon examination of the attendance register, the complainant became aware that the respondent had failed to attend work for 24 days in a row from 16 July 2019 up to 8 August 2019 without authorisation. The complainant then lodged a police report as per Butterworth Report 5823/19 in regards to this matter;

(b) on 27 February 2020 at about 3.45pm, Sergeant Ismail Mohd Noor arrested the respondent at the Northern Seberang Perai Police District Headquarters. A police report was lodged on the arrest of the respondent as per Kepala Batas Report 1610/20;

(c) the case was investigated by Insp Norma Abdul Razak. It was concluded upon investigation that the respondent had not attended work for 24 days consecutively without obtaining authorisation; and

(d) exh P6 was also tendered which was the appointment certificate of the respondent as a police officer with the rank of 'konstabel sokongan'.

[7] During mitigation at the magistrates court, the counsel reasoned that the respondent was remorseful of his actions and was depressed and faced trauma due to the fact that the respondent's father had just passed away due to heart attack on 7 June 2019. The counsel urged the magistrate not to grant a custodial sentence but instead grant a bond of good behaviour and that even by doing so it would still have a detrimental effect on the respondents employment as he would still lose his livelihood as a conviction is still recorded pursuant to s 294A of the CPC.

[8] The deputy public prosecutor on the other hand argued that the time span between the demise of the respondent's father and his absence from work was far apart and urged the magistrate not to consider humanity in sentencing such cases. The deputy public prosecutor also submitted that the offence committed by the respondent was a serious offence and therefore reiterated upon the court to impose a custodial sentence of up to 12 months as there is no other sentence that can be imposed on the respondent and that the magistrate was bound by statute to grant a custodial sentence.

THE LAW ON APPEALS

[9] It is trite law that an appellate court should be slow to interfere with sentences imposed by a trial court. This principle was enumerated in *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b where the Supreme Court stated:

> In this regard we would observe that it is the established principle that an appellate

court should be stow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[10] In *Abdul Rahman bin Ibrahim v The Public Prosecutor of Johore* [1938] 1 MLJ 219, McEiwaine CJ laid out the practice and principles that should be applied in determining appeals regarding sentences imposed:

> Sentence is, subject to the limits imposed by law, a matter of discretion. The Court of Appeal will not lightly interfere with the exercise of discretion but when the statute under which an appeal is brought provides that the appellate court shall, if it thinks that a different sentence should have been passed, quash the sentence and pass some other sentence the occasion may well arise when the power conferred should be exercised.
>
> In this respect we see no difference in principle between civil and criminal cases, and we adopt the words of Lord Atkin in *Evans v Barllam* (1937) AC 479; 53 TLR 689 'while the appellate court in the exercise of its appellate power is, no doubt, entirely justified in saying that normally it will not interfere with the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it.
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> Lord Wright in the same case said 'But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order unless he has applied a wrong principle'.

In the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457, Mohamed Dzaiddin CJ held that:

> It is of the upmost importance to stress here that the appellate court will not normally alter sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence, see *Public Prosecutor v Lao Choon Fait* [1976] 2 MLJ 256; [1976] 1 LNS 102.

[11] Therefore, a court hearing an appeal must be vigilant and ruminative to interfere with sentences passed by a trial court until and unless the sentence is said to be manifestly wrong, meaning which it is illegal or of being unfitting based on facts and circumstances. It is not the duty of an appellate court to determine what it thinks the sentence should be as this is very much within the four corners of a trial court to determine and appellate courts should not have it in mind that they should enhance or reduce a sentence based on their very view and belief as to what amounts to a sentence which is fair, just and reasonable.

[12] The issue for consideration in this appeal was whether the sentence imposed by the magistrate under s 294 of the CPC was manifestly inadequate in view of the statutory penalty provided for under s 86(1) of the Police Act 1967 (Act 344).

[13] To begin with, the wordings of s 86(1) of the Police Act 1967 provide as follows:

> 86 Desertion
>
> (1) Any police officer who, without reasonable cause, the onus of proof whereof shall rest with him, absents himself from duty for a continuous period of twenty-one days or in circumstances which show that he has the intention of not returning to his duty shall be deemed to have deserted, and shall be guilty of an offence *and shall be liable on conviction to imprisonment for a term not exceeding twelve months.* (Emphasis added.)

[14] From reading the stated provision, the wordings used are 'shall be liable'. It is settled law that there exists a difference when a provision uses the term 'shall be liable' in comparison to 'shall be punished'. This was explained long before in the case of *Public Prosecutor v Man bin Ismail* [1939] 1 MLJ 207; [1938] 1 LNS 54, Aitken J had elucidated the principle when a statute uses the term 'shall be liable', the trial court would have the absolute discretion whether to punish the accused with imprisonment as provided by the statute or deal with the accused in line with the probationary provisions:

> It would also seem that the learned magistrate, who tried this particular case, was under the impression that because the section provides that every person found guilty of an offence against it 'shall be liable to imprisonment for six months', therefore he was compelled to pass some sentence of imprisonment on such a person however many mitigating circumstances might be present. If that was his impression, then in my opinion he was under an entirely wrong impression as to the meaning of the words 'shall be liable to'. To my mind they give the court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the probationary provisions of s 294 of the Criminal Procedure Code. If the Legislature had intended that all persons convicted of an offence against this s 3(a) of the Vagrants and Decrepit Persons Enactment should be sent to prison, whatever the circumstances may be, it would have used the expression 'shall be punished with imprisonment', which is to be found so frequently in our Penal Code.

[15] In *Philip Lau Chee Heng v Public Prosecutor* [1988] 3 MLJ 107; [1988] 2 CLJ 873; [1988] 2 CLJ Rep 144, Chong Siew Fai J ruled:

> Counsel for the appellant also cited *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b; [1985]1 LNS 25 and argued that the legal effect of the phrases 'shall be liable to' and 'shall be punished with' was the same and that despite the use of the words 'shall be punished with', the court still had discretionary power in meting out

sentences. The case of *Mohamed Nor & Ors*, was on s 298A of the Penal Code as then existing ie, before the amendment by Act A614/85. In the unamended form, it, unlike the instant case before me, provided for alternative forms of sentences of imprisonment (which might extend to three years), or fine or both. Moreover, s 294 of the Criminal Procedure Code (relating to first offenders) was not then excluded from application. In that case the trial court had seen it fit to apply s 294 and on appeal the Supreme Court refused to interfere. In our instant case, the question of applicability of the said s 294 is not in issue. It was not even raised. In any event, the said section is clearly inappropriate for application having regard to all the facts and circumstances in the instant case. It is also my view that there is clear distinction between the phrases 'shall be liable to' and 'shall be punished with'.

[16] Based on the decided cases above, it is unambiguous that when a statute uses the term 'shall be liable', the court is granted the discretion whether or not to pass down probationary orders such as s 294 of the CPC and s 173A of the CPC. Using the term 'shall be liable' instead of 'shall be punished' in a penal provision, reflects on the aim of the Legislature in conferring the discretion to the courts. When a law has been passed by stating 'shall be punished' it would naturally mean that the Legislature does not seek the courts to pass down any other sentence other than what is provided by the said law. When the wordings 'shall be liable' is used it would constitute that the discretion is given to the courts if a probationary order is deemed more suitable, as at the end of the day the choice for the fitting term or word is to be made by Parliament itself.

SECTION 294 OF THE CPC

[17] Section 294 of the CPC which, in regards to first offenders provides:

294 First offenders

(1) When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any Court if it appears to the Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

(2) The Court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution or some portion of the same within that period and by such instalment as may be directed by the Court.

Section 432 shall be applicable to any direction made under this subsection.

(3) If a Court having power to deal with the offender in respect of his original offence, or any Court of summary jurisdiction, is satisfied by information on oath

that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his apprehension.

(4) Any offender when apprehended on any such warrant shall, if not immediately brought before the Court having power to sentence him, be brought before a Magistrate, and the Magistrate may either remand him by warrant until the time at which he is required by his bond to appear for judgment or until the sitting of a Court having power to deal with his original offence, or may admit him to bail with a sufficient surety conditioned on his appearing for judgment.

(5) The offender, when so remanded, may be committed to prison and the warrant of remand shall order that he be brought before the Court before which he was bound to appear for judgment or to answer as to his conduct since his release.

(6) This section shall not apply —

(a) if the offender is charged with a serious offence; or

(b) if the offender is charged with the commission of an act of domestic violence as defined under section 2 of the Domestic Violence Act 1994.

[18] In essence, the provision is one which allows the courts to grant a person convicted, a probation of good conduct by entering into a bond with or without sureties for a period to be decided by the court. Matters which are to be considered by the courts in exercising this discretion are character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed. If the offender fails to adhere to any of the conditions of his bond within the specified period, he is to be brought back before the court before which he was bound to appear for judgment or to answer as to his conduct since his release.

[19] In *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68; [1973] 1 LNS 56, the Federal Court concisely explained the effect of s 294 of the CPC where Ong Hock Sim FJ delivering the judgement ruled:

> This section vests the court before which a person is convicted with power to suspend sentence for such period as the court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence. As Thomson J (as he then was) said in *Public Prosecutor v Idris* [1955] 1 LNS 93:
>
> > Section 294 which only applies in the case of adult offenders *can only be made use of where a person has been convicted and where his conviction is for an offence punishable with imprisonment without the option of a fine.*
> >
> > I do not wish to lay down any hard and fast rule, which in any event would be difficult to prove, but magistrates would be well-advised only to make use of s 294 where an offence which is generally of a serious nature and which is

punishable with imprisonment has been committed. By an adult offender and where it is considered desirable to place him on probation.

In our view, if the Legislature intended that s 294 is to cease to have application in respect of an offence under s 15 of the Prevention of Crime Ordinance, it should be so expressed in the clearest possible language. We can find no such provision.

[20] In the case of *Public Prosecutor v Bahar bin Abu* [2007] 8 MLJ 219; [2007] 4 CLJ 604, Nallini Pathmanathan JC (now FCJ) has explained the application of the provisions of s 294 of the CPC as follows:

[12] *Can a good behaviour bond be imposed where the penalty prescribed by law is a mandatory sentence of imprisonment? It would appear so.*

[13] In *Public Prosecutor v Idris* [1955] MLJ 234, Thomson J (as he then was) advised magistrates that s 294 of the CPC was only applicable in the case of offences punishable with imprisonment. This was subsequently extended to include offences which prescribed alternative punishments in *Public Prosecutor v Yeong Yin Choy* [1976] 2 MLJ 267. However, it is implicit in these decisions that s 294 of the CPC may be utilised whether the terms of sentence prescribed use the mandatory form 'shall be punished' or otherwise.

[14] Similarly in *Public Prosecutor v Lim Hong Chin* [1993] 3 MLJ 736, this issue, ie, whether s 294 of the CPC could be utilised where alternative forms of punishment were provided for, was considered. The offence committed was under s 414 of the PC, which like s 411 of the PC, provides for the alternative punishments of imprisonment or fine or both but when the stolen property is a motor-vehicle or a component part, the section prescribes that the offender '... shall be punished with imprisonment for a term of not less than six months and not more than seven years and shall also be liable to fine ...'. In that case, the magistrate had released the offender on a good behaviour bond. Chong Siew Fai J followed the decision in *Public Prosecutor v Yeong Yin Choy* [1976] 2 MLJ 267 and held that the provisions of s 294 of the CPC are applicable where the offence prescribes alternative forms of punishment.

[15] Again it is implied in this decision that even in cases where there is a mandatory requirement for imprisonment, s 294 of the CPC can still be utilised by a court in dealing with an offender. And in *Winston Rajah v Public Prosecutor* [1999] 1 CLJ 315, Richard Malanjun J (as His Lordship then was) stated in the course of his judgment that he had no reason to doubt the correctness of the contention that '*... the existence of a minimum sentence does not deprive this court from exercising its discretion under s 294 of the CPC*'.

[16] *The words 'punishable by imprisonment' found in s 294 of the CPC indicate that it is applicable to offences that 'can' be punished by imprisonment. Both a mandatory and an optional imposition of a sentence of imprisonment are instances where a court 'can' punish by imprisonment*. It would therefore follow that the court has a discretion to utilise the section even where the sentence prescribed is a mandatory term of imprisonment. If the circumstances of the offence are 'inappropriate' for the application of s 294 of the CPC, the court can decline to exercise its discretion to use the section (see *Teh Ah Cheng v Public Prosecutor* [1976] 2 MLJ 186).

A [18] In *Public Prosecutor v Kandasamy* all Muniandy, Data' Zaharah Ibrahim J considered the exact issue that is before this Court and came to the conclusion that the provisions of s 294 of the CPC were not ousted by s 411 of the PC, after examining inter alia, the decisions of the Supreme Court in *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b and *Nordin Yusmadi v Public Prosecutor* [1997] 3 MLJ 754. In the former case, the High Court had dealt with the offender under s 294 of the CPC in respect of an offence under s 298A, which deals with causing disharmony, disunity or feelings of enmity, hatred or ill-will on grounds of religion. The Supreme Court, although it expressed the opinion that s 294 of the CPC was inappropriate and that a term of imprisonment was more appropriate, did not interfere with the sentence imposed by the High Court. *By implication therefore, the utilisation of s 294 of the CPC was not precluded nor stated to be illegal or overridden*

...

[20] In view of the decisions of the Court of Appeal and Supreme Court in the aforesaid cases, as well as the existence of express exclusionary sections in the Penal Code where *ss 173A and 294 of the CPC are not to be used, it would appear that notwithstanding the mandatory nature of the provisions of imprisonment provided under s 411 of the PC, it is open to the magistrate to deal with such an offender under s 294 of the CPC. Therefore in the instant case, the learned magistrate did not fall into error when dealing with the respondent under s 294 of the CPC in respect of an offence under s 411 of the PC.* (Emphasis added.)

[21] With regard to the application of s 294 of the CPC, His Lordship Raus Sharif FCJ (as he then was) in the case of *Nor Afizal bin Azizan v Public Prosecutor* [2012] 6 MLJ 171; [2012] 6 CLJ 370 has made the following observations:

[21] At this juncture, we would like to clarify the misconception on the applicability of s 294 of the CPC. We would like to point out that the orders made under s 294 of the CPC do not exonerate the person of the offence that he had committed. The person is in fact convicted of the offence and the conviction will be recorded and will form part of the person's criminal record and will remain there for the rest of that person's life. The effect of such an order was clearly spelled out in the case of *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68; [1973] 1 LNS 56, wherein Ong Hock Sim FJ held that:

> *This section vests the court before which a person is convicted with power to suspend sentence for such period as the court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence*

[27] *Thus, in the instant case, the appellant was in effect given a suspended prison sentence. He has to behave himself for a period of five years. If he behaves himself during the five years period, he would escape punishment for his offence. But if he fails to observe the conditions of his bond, he will then be arrested and dealt with for the original offence of rape. Like the learned SCJ, we are hopeful that the suspended sentence would give the appellant another chance in life and that he will 'turn over a new leaf'. If the order of the*

suspended prison sentence has the effect of rehabilitating him, then public interest has indeed been served and best served. (Emphasis added.)

[22] The provision of s 294 of the CPC is an alternative to the punishment of imprisonment which is statutorily provided under various penal provisions. However, s 294 of the CPC is not applicable for offences defined as a 'serious offence'. The definition of serious and non-serious offence is provided by ss 52A and 528 of the Penal Code as follows:

52A 'Non-serious offence'

The words 'non-serious offence' denote an offence punishable with imprisonment for a term of not more than ten years.

52B 'Serious offence'

The words 'serious offence' denote an offence punishable with imprisonment for a term of ten years or more.

[23] Hence, s 294 of the CPC would only be applicable to penal provisions which carry a term of imprisonment of less than ten years. Whereas 'serious offences' are defined to be an offence punishable with imprisonment for a term of ten years or more. Applying s 294 of the CPC to offences that carries an imprisonment term of less than ten years is therefore not an illegality as it is still well within the jurisdiction of the courts to exercise such discretion.

[24] Thus, there is no illegality when a court applies s 294 of the CPC for the offence of desertion pursuant to s 86(1) of the Police Act 1967 as the offence carries an imprisonment of a maximum of 12 months which is well below the threshold of ten years. The discretion to apply s 294 of the CPC is well within the powers and ambit of the magistrate after considering the severity of the charge, facts and reflecting upon the mitigating and aggravating factors. In *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441 the High Court ruled:

The phrase 'pass sentence according to law' in s 173(m)(2) of the Criminal Procedure Code (FMS Cap 6) means that the sentence imposed must not only be within the ambit of the punishable section, but must also have been assessed and passed in accordance with established judicial principles.

PRINCIPLES OF SENTENCING

[25] The next issue which this court wishes to deliberate upon are the principles and purposes of sentencing. When a trial court is deliberating upon sentencing of a person, principles and purposes of sentencing must always be applied and be considered. Principles of sentencing provide justification and ought to be applied equally bearing in mind the facts and circumstances of each

particular case. On the other hand, purposes of sentencing are the aims or the outcomes wished to be achieved and realised by the courts in line with the law. A sentence may have a sole or multiple purpose it wishes to achieve based on the circumstances of each case in particular. A magistrate when determining this must ask oneself: 'by imposing this sentence, what will the punishment achieve (within the ambits ofthe law)?'.

[26] As it is well known the four classical purposes to be applied when considering the appropriate sentence are retribution, deterrence, prevention and rehabilitation. Some heinous offences such as murder, culpable homicide, rape, robbery and those which involve violence retribution, deterrence and prevention would be the main focus of the punishment and not rehabilitation.

[27] As for rehabilitation, which is often seen solely as a way to aid an accused in becoming an efficacious member of society but it is also aimed benefiting society. By rehabilitating offenders, it is hoped that offenders will be equipped with the right mind set and skills to live a life by making choices that are well reasoned and grounded. Thus, by achieving this, the criminal tendency of that person will be suppressed and society will be safeguarded against crimes as the said person would no longer be bent on committing crimes.

[28] In addition, reparation which is a form of restorative justice is also a purpose of sentencing which has shown much emergence recently particularly in the criminal justice systems of western nations. Reparation is based on the notion demanding that a criminal make amends to victims by countervailing the wrong that they have committed in order to correct their crimes.

[29] The question which also anses, in the case before this court today, by granting a good behaviour bond would the principles and purposes of sentencing be achieved? To answer this the charge, facts as well as aggravating and mitigating factors must be looked upon.

FACTORS TO BE CONSIDERED

[30] In this very appeal before this court, it is prevalent from the charge as well as the facts of the case, that the respondent was a 'konstabel sokongan' who was absent without leave for a period of 24 consecutive days from 16 July 2019 until 8 August 2019, before a police report was lodged by the complainant.

[31] During mitigation in the trial court the learned counsel for the respondent pointed out that the courts should show empathy to the respondent as his father had passed away on 7 June 2019 caused by a heart attack, which was about a span of one month from the date the respondent began his desertion. It was also stated that the respondent's mother was unwell

and needed to be cared for by the respondent and due to this the respondent was facing hardship as the livelihood of his family now depended on him upon his father's demise. The counsel for the respondent pointed out that the respondent currently only sells drinks and could not obtain a permanent occupation because of these reasons.

[32] On the other hand, the deputy public prosecutor argued that the lapse between the demise of the respondent's father and his absence from work was had a long gap in-between and thus ought not to be used as a reason. She argued that the offence was a serious offence and the responsibilities and accountability afforded to a police officer should not be taken lightly as it involves maintaining peace.

IMPRISONMENT OR BOND OF GOOD BEHAVIOUR?

[33] The ultimate question which must be answered now is whether imprisonment should be imposed or a bond of good behaviour has fulfilled the purposes and principles of sentencing?

[34] As stated prior to this, there is no illegality done by the magistrate ·in handing down a bond of good behaviour pursuant to s 294 for offences pursuant to s 86(1) of the Police Act 1967 and is very much in accordance with the law. Thus, the court must determine whether the bond of good behaviour pursuant to s 294 of the CPC granted by the magistrate is suitable to the proved facts and circumstances as stated in *Public Prosecutor v Mohamed Nor & Ors*.

[35] The offence committed by the respondent is one which does not involve violence, malice or brutality as well as it does not amount to threat to public security and safety of others.

[36] An offence of desertion is *mala prohibita* in nature meaning which the act is deemed as a crime because it is prohibited by statute, although the act itself is not necessarily immoral and is not something which is *mala in se* which means an offence that is evil or wrong from its own nature regardless of a statute of law. The Supreme Court of India in *Bachan Singh v State of Punjab* AIR 1980 SC 898; 1980 CriLJ 636; 1982 (1) SCALE 713; (1980) 2 SCC 684; 1983 1 SCR 145, the difference between these two classes of offences were explained:

> 62. This is particularly true of crimes inherently vicious and pernicious, which under the English Common Law were classified as crimes *mala in se* as distinguished from crimes mala prohibita. Crimes *mala in se* embrace acts immoral or wrong in themselves, such as, murder, rape, arson, burglary, larceny (robbery and dacoity) while crimes mala prohibita embrace things prohibited by statute as infringing on others' rights, though no moral turpitude attaches to such crimes. Such acts

constitute crimes only because they are so prohibited.

[37] The courts in determining the sentence to be imposed, is at liberty to take this as a factor to be considered. Crimes which are overtly violent and heinous which are *mala in se* should never be given a light sentence as the correct purpose of sentencing would be aimed at deterrence and retribution. A person who commits an offence as such must be shown abhorrence by the justice system. However, for offences which are *mala prohibita* in nature, the courts may consider in passing a sentence having rehabilitation in mind amongst other sentencing purposes. Section 86(1) of the Police Act 1967 committed by the respondents is indeed a *mala probita* offence.

[38] Subsequently, in this case the respondent was a first offender and he had no prior convictions. It has been a long judicial principle to award leniency to first offenders. In *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111; [1982] 1 LNS 96, Muhamad Azmi J granted a bon of good behaviour pursuant to s 173A of the CPC and His Lordship reasoned that the accused was a first-time offender and the charge against the accused was a technical one. Meanwhile in *Joseph D' Cruz v Rex* [1940] 1 MLJ 94; [1940] 1 LNS 35 where the accused was charged with secreting a postal package, an offence then punishable pursuant to the Post Office Ordinance, Terrel J had reduced the sentence to six months imprisonment.

[39] Therefore, upon considering and deliberating upon the facts and circumstances of each case, leniency should be awarded to first time offenders to allow them a chance to change their ways.

[40] On another note, the respondent had pleaded that a sentence of imprisonment would case hardship to his family. The respondent's father had just passed away about one month prior to his desertion and this was scarring and damaging for the respondent as he had to tend for his ailing mother and family from then.

[41] After considering all these factors, the court must consider whether by imposing incarceration, it would adhere to the principles and purposes of sentencing or would it just be an inconsequential sentence with no underlying effect. In *Raja Izzuddin Shah v Public Prosecutor* [1979] 1 MLJ 270; [1978] 1 LNS 165, Hashim Yeop Sani J it was ruled:

> Considering all the facts before the court I have come to the conclusion that the public interest is in no way better served by committing the appellant to prison. The primary purpose of punishment is reformatory and it is clear in this case that the appellant has realised the fact that notwithstanding his status he is not above the law.

[42] It is also the findings of this court that a bond over of good behaviour is the most appropriate sentence in the respondent's case. This court has given primary consideration to the respondent's guilty plea. The respondent's willingness to plead guilty promptly and unconditionally has saved time, energy and cost of all parties especially on the part of the court. It is undeniable that the promptness of the respondent to plead guilty allows the trial court to settle the trial of the respondent's case promptly and this of course expedites the decision by the court on the conviction and sentence of the respondent. Bearing in mind, that the respondent was well aware that when pleading guilty he might have faced imprisonment and that a conviction would be recorded against him that would cause hinderance for his future prospects as the conviction recorded would label him as a criminal for the rest of his life. In addition, being a public servant, he would know the consequences of a conviction on his current occupation, but nevertheless he did plead guilty.

[43] In the case of *Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181; [1998] 2 CLJ 370, Augustine Paul JC (later FCJ) touched on the effects of the accused's guilty plea and stated as follows:

> It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45). However, as I had the occasion to observe in *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441 at p 446:
>
> > ... Be that as it may, this rule is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in appropriate cases (see *Lee Say & Ors v Public Prosecutor* [1985] 2 CLJ 155.
>
> *In my opinion, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration*. Its application in favour of the accused depends on the circumstances of each case ... In *Public Prosecutor v Low Kok Wai* [1988] 3 MLJ 123; [198872 CLJ Rep 268, Mohamed Dzaiddin J (as he then was) said at p 124:
>
> > ... In the present case, the only mitigating factor is the accused's plea of guilty. It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused. (Emphasis added.)

[44] In this current appeal before this court, upon considering all the factors as stated and discussed above, this court is in agreement with the order imposed by the magistrate's court which was pursuant to ss 294 and 294A of the CPC. This court is of the view that, upon consideration of the mitigating and aggravating factors and deliberating upon the facts of the case, a bond of good behaviour pursuant to s 294 of the CPC serves the principles and purposes of

sentencing in this case and it is in line with established judicial principles.

[45] Rehabilitation as the main purpose of sentencing was rightly applied by the magistrate in this case, after consideration of the facts and circumstances presented upon determining the sentence imposed on the respondent.

[46] This court does not view that by imposing a bond of good behaviour under s 294 of the CPC, will not have an effect on the respondent. As stated earlier, it is very well known that s 294 of the CPC records a conviction, and the respondent through his life will carry this conviction as a burden that will have adverse effects on his prospects for occupation and other matters as well.

DECISION

[47] Upon perusal of the records of appeals and the written submissions of both parties and hearing the oral arguments put forward, this court hereby dismisses the appeal by the public prosecutor and the decision of the Butterworth Magistrate's Court is hereby upheld.

Appeal dismissed.

Reported by Muhamad Azham Marwan